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FEDERAL COMMUNICATIONS COMMISSION (202) 429-7049
OFFICE OF THE SECRETARY

November 13, 1997

Megalie Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: *Second Report and Order and Further Notice of Proposed
Rulemaking*, WT Docket No. 97-82.

Dear Madame Secretary:

The following will serve as the comments of ClearComm, L.P., the successor entity to PCS 2000, L.P. and broadband PCS C Block licensee [hereinafter ClearComm], in the above-referenced proceeding [hereinafter NPRM].

In asking for comment on a wide variety of issues regarding the re-auction of PCS spectrum, the Commission has specifically requested comment on its tentative conclusion "that the withdrawal, default, and disqualification rules for the reauction should be based upon the procedures established in our general competitive bidding rules", and its proposal "[w]ith regard to bids that are submitted in error, . . . to apply the guidelines that the Commission has fashioned to provide for relief from the bid withdrawal payment requirements under certain circumstances."¹ The gist of the policy thus far developed, as ClearComm understands it, is that waiver of bid withdrawal payments assessed against applicants will be given only in circumstances in which the Commission's remote bidding system may have been complicit in the submission of erroneous bids.² ClearComm submits that the policy thus far enunciated by the Commission is too limited, is inconsistent with an established body of case law and public policy, and is not reasonably related to the Commission's announced goals. Accordingly, ClearComm urges the Commission at the very least to announce a policy in which bid withdrawal or rescission is allowed without penalty where a bid is clearly mistaken as a result of an arithmetical or clerical error and the bidder promptly notifies the Commission upon discovery.

¹ NPRM at ¶ 98 (cites omitted).

² E.g., *Atlanta Trunking Associates, Inc.*, 12 FCC Rcd 6382 (1997).

As the Commission is aware, on January 23, 1996, in Round 11 of the C Block auction, ClearComm's bidding agent submitted a bid of \$180,060,000 for the Norfolk, Virginia, market – exactly 10 times the intended bid – as the result of adding an extra 0 at the end of the bid. While the aftermath of that bid resulted in a \$1 million forfeiture against ClearComm³ and a hearing designation order against two former ClearComm officials⁴, there is no doubt that the bid itself was clearly erroneous. Indeed, in imposing a forfeiture against ClearComm, the Commission stated “that the record demonstrates that human error is responsible for PCS 2000's January 23, 1996, Round 11 bid of \$180 million for the Norfolk BTA.”⁵ Despite this, however, the Wireless Telecommunications Bureau issued an order setting the bid withdrawal payment for the error in excess of \$3.2 million.⁶

ClearComm has filed an application for review of the Bureau's order. In doing so, ClearComm stated its position that where a mistaken bid is the result of clear and demonstrable error – as it was in ClearComm's case – then no bid withdrawal penalty should be imposed.⁷ First, bid withdrawal penalties were intended by the Commission to discourage insincere bidding. As the Commission stated in adopting the rules, “[i]nsincere bidding, whether purely frivolous or strategic, distorts the price information generated by the auction process and reduces its efficiency.”⁸ However, by definition, human error is not “frivolous or strategic” and cannot be discouraged by a rule designed to punish such insincere bidding.

Second, the FCC's refusal to permit withdrawal of a mistaken bid without penalty is inconsistent with well-settled government auction practice. Indeed, courts have ruled that government agencies have an equitable obligation not to take advantage of a “bid [that] is based on or embodies a disastrous mistake.”⁹ While the Commission has stated that this equitable

³ *PCS 2000, L.P.*, 12 FCC Rcd 1703 (1997).

⁴ *Westel Samoa, Inc.*, 62 Fed. Reg. 53628 (1997).

⁵ *PCS 2000, L.P.*, 12 FCC Rcd at 1715.

⁶ *PCS 2000, L.P.*, DA 96-2156 (released December 20, 1996).

⁷ A copy of ClearComm's Application for Review is attached and the arguments contained therein incorporated by reference.

⁸ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 2348, 2373 (1994).

⁹ *Ruggiero v. United States*, 420 F.2d 709, 713 (Cl. Ct. 1970).

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doctrine is "inapposite because of the unique auction methodology employed here,"¹⁰ the agency has yet to explain why the particular auction methodology somehow requires or permits the Commission to ignore this well-settled principle.

In short, the bid withdrawal penalty policy announced in this NPRM bears no reasonable relationship to the FCC's stated objectives and is inconsistent with well-settled federal auction policy. Accordingly, ClearComm respectfully requests that the Commission alter its proposed policy so that clear and demonstrable error will not form the basis for a bid withdrawal penalty.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert L. Pettit", with a long horizontal line extending to the right.

Robert L. Pettit
Counsel for ClearComm, L.P.

Attachment

cc: Mark Bollinger

¹⁰ *Atlanta Trunking Associates, Inc.*, 11 FCC Rcd 17189, 17196 (1996).

DUPLICATE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
PCS 2000, L.P.,)
Request for Waiver of)
Section 24.704(a)(1))
of the Commission's Rules)
)
PCS 2000, L.P.,)
Bid Withdrawal Payment)
for License B332)
(Omaha, Nebraska))

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JAN 21 1997
Federal Communications Commission
Office of Secretary

APPLICATION FOR REVIEW

PCS 2000, L.P. ("PCS 2000"), by its attorneys and for the reasons stated herein, respectfully requests review of the above-captioned Order of the Wireless Telecommunications Bureau, setting PCS 2000's bid withdrawal payment for License B324 (the Norfolk, Virginia Basic Trading Area ("BTA")) at \$3,273,374.00.¹

¹ In the Matter of PCS 2000, L.P., Request for Waiver of Section 24.704(a)(1) of the Commission's Rules, DA 96-2156 (rel. Dec. 20, 1996) ("Order"). The Order also assesses a bid withdrawal payment of \$1,257,771.00 for License B332 (the Omaha, Nebraska BTA). PCS 2000 does not contest this payment. The Order states that issues relating to alleged misrepresentations by Mr. Anthony Easton will be treated in a separate proceeding. This Application for Review is not intended to address such issues or affect other Commission action with regard to those issues in any way, but is filed simply to assure that PCS 2000 receives the same treatment as similarly situated parties with respect to the bidding error itself.

I. INTRODUCTION AND SUMMARY

PCS 2000, a small business controlled by women and minorities, was an active participant in the Block C auction for personal communications services ("PCS") licenses, winning fifteen BTAs around the country. On January 23, 1996, in Round 11 of the Block C auction, PCS 2000 entered new bids for 38 markets, including License B324. For each of these selected markets, PCS 2000 intended to enter the minimum bid increment. Such an increment would have resulted in a bid of \$18,006,000.00 for License B324. However, PCS 2000 inadvertently submitted an erroneous bid of \$180,060,000.00 for that market, exactly ten times as large as the intended bid. PCS 2000 discovered the error approximately two hours after the close of bidding for Round 11, when it downloaded the round results from the FCC's internet FTP server, and its agent immediately telephoned the FCC's auction contractor to indicate that the \$180,060,000.00 bid was in error. On January 24, 1996, in Round 12 of the auction, PCS 2000 withdrew its erroneous bid for License B324.

Three days after submitting the erroneous bid, PCS 2000 filed with the Commission a Request for Expedited Waiver or Reduction of the Withdrawal Penalty.² PCS 2000 subsequently amended its Request for Waiver on February 21, 1996, after discovering new information relating to the submission of its Round 11 bid.³

² PCS 2000, L.P., Request for Expedited Waiver or Reduction of Withdrawal Penalty (filed Jan. 25, 1996) (*"Request for Waiver"*).

³ PCS 2000, L.P., Amended Request for Expedited Waiver or Reduction of Withdrawal Penalty (filed Feb. 21, 1996) (*"Amended Request for Waiver"*).

On December 20, 1996, the Bureau ruled on PCS 2000's *Amended Request for Waiver*, concluding that "an erroneous bid had been made by PCS 2000, the Commission was properly notified, and the bid was withdrawn in the next round."⁴ Thus, the Bureau found "that full enforcement of the bid withdrawal payment provisions in this instance would not serve the purpose of the bid withdrawal rule, and would be contrary to the public interest."⁵

Despite acknowledging that PCS 2000's bid for License B324 was an obvious mistake that PCS 2000 promptly attempted to correct, the Bureau nevertheless imposed a penalty of \$3,273,374.00 on PCS 2000, based on a formula adopted in the Commission's *May 3 Order* dealing with two other such waiver requests.⁶ In the *May 3 Order*, the Commission noted

that the bid withdrawal payment provisions are silent on how to address erroneous bids which result from typographical or clerical errors. In cases in which the erroneous bid exceeds the intended bid by factors of 10 or more, full application of the bid withdrawal payment provisions could impose an extreme and unnecessary hardship on most bidders.⁷

The Commission was "concerned, however, that a complete waiver of these provisions could threaten the economic efficiency of the auction process. Such a precedent would encourage future bidders who are uncertain about how much more to bid on a particular

⁴ *Order* at ¶ 9.

⁵ *Id.*

⁶ In the Matter of Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C., Requests to Waive Bid Withdrawal Payment Provisions, FCC 96-203 at ¶ 8 (rel. May 3, 1996) ("*May 3 Order*").

⁷ *Id.* at ¶ 14.

license to submit 'mistaken' bids intentionally so as to gain insight into competitors' valuation of licenses."⁸ Thus, the Commission devised the following formula to calculate bid withdrawal payments for mistaken bids: If a mistaken bid is withdrawn in the same round in which it was submitted, the bid withdrawal payment will be the greater of a) the minimum bid increment for that license and round; or b) the standard bid withdrawal payment calculated as if the bidder had made a bid at the minimum accepted bid. If a mistaken bid is withdrawn in the round immediately following the round in which it was submitted -- as is the case here -- and the auction is in Stage I or Stage II, the withdrawal payment will be the greater of a) two times the minimum bid increment during the round in which the mistaken bid was submitted or b) the standard withdrawal payment calculated as if the bidder had made a bid at one bid increment above the minimum accepted bid.⁹ Applying this newly devised formula to PCS 2000 yields a penalty of \$3,273,374.00.

II. A \$3,273,374.00 BID WITHDRAWAL PAYMENT FOR AN INADVERTENT BIDDING ERROR IS NOT REASONABLY RELATED TO THE COMMISSION'S PUBLIC INTEREST OBJECTIVES NOR IS IT SUPPORTED BY CASE PRECEDENT

The *Second Report and Order* in the Commission's competitive bidding rulemaking proceeding establishes a bid withdrawal payment requirement in order to discourage insincere bidding. As the Commission stated, "[i]nsincere bidding, whether purely frivolous or strategic, distorts the price information generated by the auction process and reduces its

⁸ *Id.* at ¶ 16.

⁹ *May 3 Order* at ¶ 18.

efficiency.”¹⁰ However, as recognized by the Bureau, PCS 2000’s bidding error was neither frivolous nor strategic but rather, an obvious, unintended mistake. Because the agency’s competitive bidding rules, at the time of the Block C auction, did not contemplate penalizing parties who made inadvertent erroneous bids, the Commission should grant PCS 2000 unequivocal relief from any bid withdrawal payment relating to License B324.

Full relief from this bid withdrawal penalty should be granted as a matter of both law and equity. Indeed, the FCC’s refusal to permit withdrawal of a mistaken bid without penalty is inconsistent with auction industry practice. As MAP Wireless, L.L.C. (“MAP”) notes,

[a]lthough auctions are quite new to the Commission, competitive bidding principles and procedures are not new to government, and have been used extensively for years by other agencies. There is an established body of precedent relating to clerical or arithmetical errors that is and should apply to the instant facts.¹¹

Specifically, in cases involving competitive bidding with government agencies, bid withdrawal or rescission has been allowed without penalty where a bid is clearly mistaken as a result of an arithmetical or clerical error, and the bidder promptly notifies the government agency upon discovery. In particular, bid withdrawal or rescission without penalty is required where the error is clear and the circumstances surrounding the bid itself are so extraordinary as to raise a question on its face as to whether a clerical or arithmetical error has occurred.¹² In

¹⁰ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 2348, 2373 (1994) (“*Second Report and Order*”).

¹¹ MAP Wireless, L.L.C. Petition for Reconsideration of Bid Withdrawal Payment at 8 (filed June 3, 1996) (“*MAP Petition for Reconsideration*”).

¹² See, e.g., *Ruggiero v. United States*, 420 F.2d 709 (Cl. Ct. 1970); *Chernick v. United* (Continued...)

these circumstances, the government agency has an equitable obligation not to take advantage of a "bid [that] is based on or embodies a disastrous mistake."¹³ The cases further recognize that "the most ordinary kind of arithmetical or clerical mistake involves the misplacing of a decimal. Any instance of a monetary figure one-tenth or ten times what it might naturally be expected to be, is a warning flag."¹⁴

Surprisingly, the Commission summarily rejected the applicability of this equitable doctrine "which the federal courts impose upon all other federal and state agencies that utilize auctions or other bid submission processes,"¹⁵ finding it "inapposite because of the unique auction methodology employed here (*e.g.*, simultaneous multiple round bidding.)"¹⁶ However, "it is difficult to imagine precedent that is more on point or more compelling in dictating relief on the present facts."¹⁷ Indeed, professionals within the auction industry have commented that such equitable principles should apply here.¹⁸

(...Continued)

States, 372 F.2d 492 (1967).

¹³ *Ruggiero*, 420 F.2d at 713.

¹⁴ *Chernick*, 372 F.2d at 495.

¹⁵ See Reply Comments of Antigone Communications Limited Partnership, DA 96-154 at 4 (filed March 1, 1996).

¹⁶ *May 3 Order* at ¶ 16.

¹⁷ MAP Petition for Reconsideration at 9.

¹⁸ See Comments of Kennedy-Wilson International, DA 96-154 at 2 (Feb. 16, 1996) ("In the specific cases before the Commission, each of the bidding errors was clearly an error. Each bidder, when it became aware of [its] mistake, withdrew [its] bid immediately . . . In each case, it is also clear that no attempt at "gaming" was being made by the bidders. Accordingly, our recommendation in each of these three cases is that the withdrawal payment

(Continued...)

Instead, the FCC adopted new rules in its *May 3 Order* designed "to eliminate the strategic benefit of purposely submitting mistaken bids."¹⁹ Thus, while recognizing that full enforcement of the bid withdrawal payment provisions would not serve the public interest in the case of PCS 2000's clearly mistaken bid, the Bureau nevertheless applies the new formula and imposes a \$3,273,374.00 penalty on PCS 2000 so as to deter strategic behavior that "could threaten the economic efficiency of the auction process."²⁰ Both the Bureau and the Commission fail to explain, however, how complete relief from the bid withdrawal penalty would encourage strategic erroneous bids. Parties commenting on the bid withdrawal waiver requests agree with PCS 2000's conclusion that "[p]enalties are *not* needed or effective in 'detering' bidders from committing errors. Given the cost and anxiety associated with any waiver request, every applicant has a powerful incentive to avoid mistakes."²¹ The agency's

(...Continued)

requirement be waived entirely. Inadvertent entry errors by bidders, immediately corrected and reported, should not be subject to penalty – especially the onerous and excessive penalties which now result"); Comments of National Auctioneers Ass'n, DA 96-145 at 2 (Feb. 22, 1996) ("bidders who submitted flawed bids where there is no evidence of improper attempts to control the bids should be excused from bid withdrawal penalties").

¹⁹ *May 3 Order* at ¶ 17.

²⁰ *Order* at ¶ 8.

²¹ Reply Comments of PCS 2000, DA 96-145 at 3 (filed March 4, 1996) ("*PCS 2000 Reply Comments*"). See also Atlanta Trunking Associates, Inc. Petition for Reconsideration at 8 (filed June 3, 1996) ("*ATA Petition for Reconsideration*") ("[a]s a practical matter, any bid ten times the minimum bid increment must be *presumed* to be cast in error. No rational bidder would risk a huge bid withdrawal penalty just to gain insight into a competitor's strategy"); MAP Petition for Reconsideration at 11 ("[t]he Commission's reasoning assumes that, if a complete waiver is granted, future bidders will cavalierly expose themselves to [] a multimillion dollar risk in order to gain a marginal strategic advantage in the auction, and trust their ability to convince the FCC to waive its bid withdrawal penalty. This proposition strains credulity").

practice of evaluating waiver requests on a case-by-case basis, requiring sworn declarations as to the veracity of factual circumstances, and denying relief where there is evidence that a bidder has engaged in insincere or frivolous bidding, renders the Commission's concerns regarding strategic erroneous bids unrealistic. Accordingly, the bid withdrawal penalty as adopted in the *May 3 Order* and imposed on PCS 2000 in the Bureau's recent *Order*, bears no reasonable relationship to the FCC's stated objectives or factual circumstances regarding the need to deter strategic auction behavior. As such, it must be rescinded and no penalty imposed where, as here, an inadvertent bidding error has occurred.

Moreover, as MAP notes, the Commission need not penalize parties who submit erroneous bids in order to address concerns regarding strategic bidding mistakes. For example, the FCC auction software could be modified to issue a specific warning to bidders if their bids exceed more than ten increments.²² Alternatively, in cases where someone requests a waiver of the full bid withdrawal penalty on grounds of mistake, the Commission could base the penalty on the next highest bid, *i.e.*, the highest "valid" bid in the round.²³ Such a penalty is likely to be proportionate to the impact of the bidding error on the auction.

In this manner, the FCC can more appropriately address its concerns about strategic or frivolous bidding without imposing excessive penalties on auction participants who make inadvertent errors. It has been noted that bidders seeking a waiver of the bid withdrawal payment do not get a free ride, as they face significant legal fees and constraints in capital

²² *Id.* at 13, citing Comments of Auction Strategy Inc., DA 96-145 at 2 (filed Feb. 12, 1996); Statement of Professor Barry Nalebuff at ¶ 4 (March 31, 1996) (Attachment to MAP's Petition for Reconsideration).

²³ See *PCS 2000 Reply Comments* at 6, n.12.

markets as well as the serious risk that the penalty will not be waived.²⁴ For these reasons, a penalty of \$3,273,374.00 as applied to PCS 2000 is unjust and unwarranted, and accordingly must be rescinded.

III. CONCLUSION

The penalty imposed by the *Order* violates an established body of case law and public policy concerning mistaken bids that result from clerical or arithmetic errors. Moreover, the penalty is not reasonably related to the Commission's goal of eliminating strategic bidding behavior. Accordingly, PCS 2000 urges the Commission to grant it a complete waiver of the bid withdrawal payment, and to rescind the \$3,273,374.00 penalty imposed by the *Order*.

Respectfully submitted,

PCS 2000, L.P.

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Dated: January 21, 1997

²⁴ *MAP Petition for Reconsideration* at 14, citing Statement of Professor Barry Nalebuff at ¶ 4.